LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 8 1965
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1965

~~330~~
No. _____

J. C. WADE,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

ZACH H. DOUGLAS
Suite 104 Law Exchange Building
238 East Forsyth Street
Jacksonville, Florida

Attorney for Petitioner

CITATIONS

	Page
CASES:	
Boyd v. United States	12
Goleman et al v. United States	5
Coyne v. United States	8
Fiswick v. United States	12
Gilbeau v. United States	12
Helton v. United States	11
Manley v. United States	8
Mora v. United States	12
Pierce v. United States	9
Richardson v. United States	10
United States v. C. L. Guild Construction Company	8
United States v. Haynes	10
United States v. Montgomery	10
STATUTES:	
28 U.S. Code, Section 1254(1)	2

INDEX

	Page
REPORTS OF OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
SUPREME COURT RULE INVOLVED	3
STATEMENT OF THE CASE	3
ARGUMENT	
THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR, WHICH SUBSEQUENT DIRECTIONS TO THE JURY COULD NOT CURE, BY ALLOWING THE GOVERNMENT PROSECUTOR TO ASK PETITIONER IF PETITIONER HAD FILED INCOME TAX RETURNS FOR THE YEARS 1960, 1961 AND 1962, AND IF PETITIONER HAD BEEN PROSECUTED FOR INCOME TAX EVASION	4
I. EVIDENCE OF ACTS OF PETITIONER IN FAILING TO FILE INCOME TAX RETURNS IN PRIOR YEARS IS COMPLETELY IRRELEVANT AND INADMISSIBLE FOR ANY PURPOSE IN A PROSECUTION FOR MAIL FRAUD	5
II. QUESTIONS INVOLVING OTHER DEFENSES ARE THEMSELVES SERIOUS ERROR, INDEPENDENTLY OF WHETHER OR NOT THE ANSWERS, IF ALLOWED INTO EVIDENCE, ARE PREJUDICIAL TO THE ACCUSED	7

Page

III. THE RULE AGAINST QUESTIONS DELVING INTO PRIOR ACTS OF A DEFENDANT IN ORDER TO IMPEACH DEFENDANT'S CHARACTER APPLIES WHETHER THE ACTS ARE OFFENSES, OR MERELY ACTS OF MISCONDUCT, WHICH TEND TO DEGRADE HIS CHARACTER BEFORE THE JURY 9

IV. THE EFFECT OF ADMITTING EVIDENCE RELATING TO OTHER OFFENSES, IF CALCULATED TO IMPRESS THE JURY WITH THE CRIMINAL CHARACTER OF DEFENDANT, IS SO PREJUDICIAL THAT IT CONSTITUTES REVERSIBLE ERROR DESPITE DIRECTIONS FROM COURT TO JURY ATTEMPTING TO CURE THE ERROR 11

CONCLUSION 13

PROOF OF SERVICE 14

APPENDICES:

A. ORIGINAL OPINION, UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT 15

B. JUDGMENT, UNITED STATES DISTRICT COURT 17

C. ORDER DENYING REHEARING 19

D. ORDER STAYING MANDATE 20

In the Supreme Court of the United States

OCTOBER TERM, 1965

No.

J. C. WADE,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

J. C. Wade prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on May 7, 1965.

REPORTS OF OPINION BELOW

The United States District Court for the Middle District of Florida entered judgment and imposed sentence, but did not deliver an opinion.

The opinion of the United States Court of Appeals for the Fifth Circuit has not yet been published in any official report. That opinion appears herein, however, at Appendix "A", Page 15.

The Petition for Rehearing was denied by the United States Court of Appeals for the Fifth Circuit without rendition of an opinion. The Order Denying Rehearing appears herein at Appendix "C", Page 19.

JURISDICTION

The date of the judgment sought to be reviewed and the time of its entry is May 7, 1965. Rehearing was denied on June 8, 1965. On June 21, 1965, the United States Court of Appeals for the Fifth Circuit issued an order staying its mandate for a period of thirty (30) days from June 8, 1965. The jurisdiction of this Court is invoked under 28 U.S. Code, Section 1254(1).

QUESTION PRESENTED

Whether a trial court committed reversible error by allowing the government prosecutor to ask Petitioner, on trial for mail fraud, if Petitioner had filed income tax returns for the years 1960, 1961, and 1962, and if Petitioner had been prosecuted for income tax evasion, and, therefore, whether or not

the court below erred in affirming the conviction of Petitioner resulting from the verdict of a jury before whom Petitioner's cause had been fatally prejudiced by the Prosecution's unfair injection of the extraneous issue of Petitioner's guilt of the totally unconnected crime of income tax evasion?

SUPREME COURT RULE INVOLVED

Supreme Court of the United States, Revised Rules, effective July 1, 1954. Rule 19, Considerations Governing Review on Certiorari, Sub-Paragraph 1(b), reading in part as follows:

> "Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter."

STATEMENT OF THE CASE

The Petitioner, J. C. Wade, was indicted upon twelve (12) counts of violation of Title 18, United States Code, Section 1341, all counts charging that he had unlawfully used the United States Mails in order to perpetrate fraud. (R., 1-8). The Petitioner stands convicted upon five counts of mail fraud.

The Petitioner testified as the sole witness in his own defense (R., 166-221). Upon cross-examination, the United States District Attorney for the Middle District of Florida, over objection of defense counsel, asked the Petitioner if he had filled out income tax returns for himself or the business in 1960 (R., 219). The prosecutor also asked Petitioner if he had filled out income tax returns for the years 1961 and 1962. The Prosecutor also questioned the Petitioner as to whether he had ever been prosecuted for income tax evasion (R., 219-220).

ARGUMENT

THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR, WHICH SUBSEQUENT DIRECTIONS TO THE JURY COULD NOT CURE, BY ALLOWING THE GOVERNMENT PROSECUTOR TO ASK PETITIONER IF PETITIONER HAD FILED INCOME TAX RETURNS FOR THE YEARS 1960, 1961 and 1962, AND IF PETITIONER HAD BEEN PROSECUTED FOR INCOME TAX EVASION.

INTRODUCTION

During the cross-examination of the Petitioner by the Government prosecutor, the following dialogue ensued:

"Q. Mr. Wade, did you fill out an income tax return for yourself or the business that year?

Mr. Roberts:

Objected to as not being proper cross examination.

The Court:

Objection overruled.

A. I did not get the question.

Q. Did you file an income tax return for yourself or the business?

A. No, sir.

(199) Q. Did you in 1961?

A. No, sir.

Q. In 1962?

A. No, sir.

Q. You have never been prosecuted for income tax evasion?

A. No, sir.

Mr. Roberts:

I object to that and ask that you admonish the District Attorney on that question.

The Court:

The objection is sustained and the jury is instructed to disregard that statement."

(R., 219-220)

I

EVIDENCE OF ACTS OF PETITIONER IN FAILING TO FILE INCOME TAX RETURNS IN PRIOR YEARS IS COMPLETELY IRRELEVANT AND INADMISSIBLE FOR ANY PURPOSE IN A PROSECUTION FOR MAIL FRAUD.

The Circuit Court of Appeals, Fifth Circuit, decided several important points of law relating to the trial of defendants for mail fraud in the case of *Coleman, et al. v. United States*, 167 F.2d 837 (1948). Among the several points was one

involving the propriety of the use by the Prosecution of evidence relating to the defendant's violation of federal income tax law.

The appellants in the *Coleman* case were indicted for ten counts of mail fraud. The jury found both defendants guilty on nine counts. *Coleman, supra,* 167 F.2d 837, at 838.

Over strong objection for defense counsel, the Government was permitted to show that defendants had failed to file income tax returns for an orphanage they operated in connection with their mail fraud schemes. *Coleman, supra,* 167 F.2d 837, at 838.

The Fifth Circuit Court of Appeals reversed the cause, holding that the introduction of evidence of defendants' failure to file income tax returns, together with other errors, constituted reversible error.

In so holding, the Court stated:

> "The argument that evidence of collateral unlawful acts is admissible to prove intent is (3) 'based purely on the doctrine of chances, and it is the mere repetition of instances, and not their system or scheme, that satisfied our logical demand. Yet, in order to satisfy this demand, it is at least necessary that prior acts should be SIMILAR (Original italics.) Since it is the improbability of a like result being repeated by mere chance that carries probative weight, the essence of this probative effect is the likeness of the instance. *** In short, there must be a similarity in the various instances in order to give them probative value, as indeed the general logical canon requires.' Wigmore on

Evidence, 3rd Ed., Vol. 2 §302, p. 200. And see detailed discussion of this question in Weiss v. United States, 5 Cir. 122 F.2d 675."

"WE THINK THAT IN NO VIEW OF THE CASE CAN VIOLATION OF THE FEDERAL INCOME TAX LAW, OR THREATS OF BODILY HARM IN CONNECTION WITH A MATTER HAVING NO RELATION TO THE ALLEGED SCHEME, BE SAID TO BE ACTS OF THE REQUISITE SIMILARITY TO THE ACTS OF SCHEMING TO DEFRAUD BY USE OF THE MAILS, OR OF ACTUALLY DOING SO. THAT EVIDENCE WAS INADMISSIBLE FOR ANY PURPOSE, SINCE THE APPELLANTS WERE NOT ON TRIAL FOR ANY OF THE ACTS SOUGHT TO BE SHOWN BY IT, NOR FOR ANY OF THE ACTS SIMILAR TO THEM; NOR COULD EVIDENCE OF THOSE ACTS TEND TO ESTABLISH APPELLANTS' INTENT TO DEFRAUD BY USE OF THE MAILS."

(Emphasis added) Coleman, supra, 617 F.2d 837, at 839-40.

II

QUESTIONS INVOLVING OTHER OFFENSES ARE THEMSELVES SERIOUS ERROR, INDEPENDENTLY OF WHETHER OR NOT THE ANSWERS, IF ALLOWED INTO EVIDENCE, ARE PREJUDICIAL TO THE ACCUSED.

The magnitude of the error committed in allowing the prosecution to question Petitioner as to whether he filed income tax returns becomes apparent in light of two Federal cases bearing upon this question.

In *United States v. C. L. Guilding Construction Company*, 193 F. Supp. 268 (1961), the United States District Court, D. Rhode Island, held that, by itself, the mere asking of the defendant by the Government on cross-examination whether there was any other inictment pending against him, without any answer being allowed, probably had a substantial influence upon the jury despite the striking of the question and cautionary instructions given by the Court. A new trial was ordered.

The *Guild* decision contains an excellent discussion of the extremely prejudicial effect of merely asking questions about prior acts of misconduct, indictments or charges in order to impeach the credibility of the defendant.

In holding evidence of this sort inadmissible and prejudicial, the Court in *Guild* quoted *Manley v. United States*, 6th Cir., 1956, 238 F.2d 221, to wit:

> "It is well settled that it is not permissible for the government to show that a defendant has been accused of, arrested for, or indicted for a crime. Only a previous conviction for crime is admissible, under appropriate circumstances.
>
> "The United States Court of Appeals for the Eighth Circuit has ruled that acts of misconduct not resulting in conviction of crime are not the proper subject of cross-examination to impeach a witness. (citing cases.)"

The Court in the *Guild* case went on to quote authority emanating from the Fifth Circuit Court of Appeals, in *Coyne v. United States*, 246 F.120 (1917).

In *Coyne*, the sole error upon which the Fifth Circuit Court of Appeals based its reversal of the cause was the admission

into evidence of an indictment under which defendant was charged with an entirely separate crime in Seattle, Washington. In holding admission of such evidence to be error, the Court in *Coyne* stated:

> "*** The fact that an unproven charge has been made against one has no logical tendency to prove that he has been guilty of any offense, or to impair the credibility of his testimony . . . . *** It would be a gross injustice to permit the fact of such a making of a charge to be used to the prejudice of the person against whom the unproved charge is made ***" Coyne Supra, 246 F. 120 at 121.

III

THE RULE AGAINST QUESTIONS DELVING INTO PRIOR ACTS OF A DEFENDANT IN ORDER TO IMPEACH DEFENDANT'S CHARACTER APPLIES WHETHER THE ACTS ARE OFFENSES, OR MERELY ACTS OF MISCONDUCT, WHICH TEND TO DEGRADE HIS CHARACTER BEFORE THE JURY.

In *Pierce v. United States*, 86 F.2d 949 (6 Cir., 1936), the Sixth Circuit Court of Appeals held that improper questions of the prosecution, suggesting that defendant had been investigated, previously indicted, that he was a fugitive from justice, that he had transferred property in fraud of creditors, and that he could not obtain credit in his home town, were prejudicial to defendant and required a new trial, despite the correct rulings of the trial Court upon the defendant's objections.

In *U. S. v. Haynes*, 81 F. Supp. 63, the United States District Court, W. D. Pennsylvania, held that acts of misconduct not resulting in conviction are not the proper subjects of cross-examination to impeach a witness or to establish and show intent, motive, identity, scheme, or plan. (Citing *U.S. v. Montgomery*, 3 Cir. 126 F.2d 151).

In so holding, the Court stated:

> "Examination cannot be made as to whether a defendant has ever been arrested, incarcerated, indicted, or engaged in the violation of a law. These facts are immaterial for even innocent persons are arrested and are subject to indictment. Furthermore, a question relating to present violation of (7) law is improper since under the Constitution no person is required to answer any question which would be self-incriminating. (Citing Amendment v. Constitution of United States, U.S.S.A. Const. Amend. V.)" U.S. v. Haynes, supra, 81 F. Supp. 63, at 68.

A third case in which the rule was applied to acts of misconduct not amounting to conviction of crime is *Richardson v. United States*, 6 Cir. 1945, 150 F.2d 58.

In this mail fraud prosecution the case was reversed because the district attorney, though he had beforehand agreed that certain matters of defendant's misconduct were not to be brought out in his examination, asked questions that concerned themselves with certain benefits received by defendants from an improvement association. The Court held that the evidence of the acts brought out was in itself prejudicial error, and also by the violation of the agreement not to bring out such matters in his examination, the prosecution prejudiced

the defendant before the jury. *Richardson supra,* 150 F.2d 58, at 63-64.

IV

THE EFFECT OF ADMITTING EVIDENCE RELATING TO OTHER OFFENSES, IF CALCULATED TO IMPRESS THE JURY WITH THE CRIMINAL CHARACTER OF DEFENDANT, IS SO PREJUDICIAL THAT IT CONSTITUTES REVERSIBLE ERROR DESPITE DIRECTIONS FROM COURT TO JURY ATTEMPTING TO CURE THE ERROR.

In *Helton v. United States,* 5 Cir. 1955, 221 F. 2d 338, a Government witness against defendant, who was being prosecuted for the crime of illegal ACQUISITION AND PRODUCTION OF MARIJUANA, testified that the defendant told him "that he had been SMOKING MARIJUANA intermittently very seldom for the past four or five years." *Helton, supra,* 221 F.2d 338, at 340 (emphasis added.)

After immediate objection from the defense, and a concession by the prosecution that the remark was improper, the trial court, acting on request from both counsel, ruled that the remark be stricken from the record. Despite the ruling, the defense moved for a mistrail, which was denied.

In holding that the remark of the witness relating to past and separate offenses constituted reversible error, the Fifth Circuit Court of Appeals stated:

> "Although unable to convince us that the evidence on which he was convicted should be suppressed because of an illegal search, we are nevertheless constrained to hold that the appellant is entitled to, and

must have, a new trial because of the admission in evidence of improper and prejudicial testimony. ***"

(9) "It is hornbook that, absent a requirement of showing system or intent, evidence of offenses not charged in the indictment is not only inadmissible, but prejudicial, if admitted. Boyd v. United States, 142 U.S. 450, 12 S. Ct. 292, 35 L. Ed. 1077; Gilbeau v. United States, 5 Cir., 288 F. 731 ***"

"It is admitted, of course, that as a general rule, evidence which is withdrawn from the consideration of the jury by the direction of the trial judge may not serve as a basis for reversible error, that the direction of exclusion by the Court cures any error which may have been committed in its introduction (Citing cases.)

BUT WHERE, AS HERE, THE IMPROPER EVIDENCE WAS CALCULATED TO MAKE SUCH AN IMPRESSION ON THE JURY THAT NO DIRECTION FROM THE COURT, HOWEVER STRONG, CAN ELIMINATE THE PREJUDICE THEREBY CREATED, THE TRIAL COURT MUST DECLARE A MISTRIAL. *Fiswalk v. United States,* 329 U.S. 211, 218, 67 S. Ct. 224, 91 L. Ed. 196; *Mora v. United States,* 5 Cir., 190 F.2d 749." (Emphasis added.)

The Petitioner James Claude Wade respectfully submits that the questioning by the Government's attorney as to his tax misconduct could have been made with no other purpose in mind than to prejudice him before the Jury; and that certainly it had this effect. Petitioner was indicted for mail fraud, not for unspecified income tax crimes. He respectfully requests that the Court grant his Petition and correct the error of the United States Court of Appeals for the Fifth

Circuit in affirming his conviction. He respectfully seeks to avail himself of the right Justice Harlan enunciated in *Boyd v. United States*:

> (10) "However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged."

CONCLUSION

WHEREFORE, it is respectfully submitted that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

.....

ZACH H. DOUGLAS
Suite 104 Law Exchange Building
238 East Forsyth Street
Jacksonville, Florida

Attorney for J. C. Wade, Petitioner

PROOF OF SERVICE

I hereby certify that I have made service of three (3) copies of the foregoing Petition for Writ of Certiorari upon the Solicitor General, Department of Justice, Washington 25, D.C., by depositing same in an envelope so addressed and placing the same in the United States Post Office at Jacksonville, Florida on the ..... day of July, 1965, with sufficient postage thereon to insure delivery.

.....

ZACH H. DOUGLAS
Suite 104 Law Exchange Building
238 East Forsyth Street
Jacksonville, Florida

Attorney for J. C. Wade, Petitioner

I further certify that I have also mailed, in due course of mail, a copy of the foregoing Petition to the Honorable Edward F. Boardman, Esquire, United States Attorney for the Middle District of Florida, 407 Federal Building, Jacksonville, Florida, this ..... day of July, 1965.

.....

ZACH H. DOUGLAS

Attorney for J. C. Wade, Petitioner

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20979

J. C. WADE,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Florida.

(May 7, 1965.)

Before TUTTLE, Chief Judge, and PHILLIPS* and WISDOM, Circuit Judges.

PER CURIAM: This is an appeal from a judgment and sentence on an indictment charging the use of the mails to defraud, in violation of 18 USCA Section 1341. Error is predicated on the admission of answers to certain questions on cross-examination of the defendant, duly objected to on the ground that they were not admissible for the purpose of

* Senior Judge of the Tenth Circuit sitting by designation

proving intent. We agree they were not admissible to show intent, but we think they were proper preliminary questions to a further inquiry, had they been answered in the affirmative, which would have tested the truth of the testimony of the defendant that he had acted in good faith and were admissible as primary evidence. Error is also predicated upon another question propounded on cross-examination of the defendant. The court sustained an objection to that question and instructed the jury to disregard it. The defendant was represented by counsel of his own choice, who did not move for a mistrial. Hence, he may not here urge that the instruction of the trial court did not cure the harm resulting from the question; and we do not think we should notice the alleged error of our own motion.

AFFIRMED.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1964

No. 20979

D. C. Docket No. 962-Cr-Ocala

J. C. WADE,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before TUTTLE, Chief Judge, and PHILLIPS* and WISDOM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Senior Judge of the Tenth Circuit,
sitting by designation.

May 7, 1965

Issued as Mandate:

APPENDIX "C"

[512] - Tuttle

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20,979

J. C. WADE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

FILED
U. S. COURT OF APPEALS
JUNE 8, 1965
EDWARD W. WADSWORTH, CLERK

Appeal from the United States District Court
for the Middle District of Florida

(JUNE 8, 1965)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, PHILLIPS* and WISDOM, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

* Senior Circuit Judge of the Tenth Circuit, sitting by designation.

APPENDIX "D"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20979

J. C. WADE,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

ON CONSIDERATION OF THE APPLICATION of the appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of thirty days from June 8, 1965; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from June 8, 1965 there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the Clerk shall issue the mandate upon

the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from June 8, 1965, unless the above-mentioned certificate shall be filed with the Clerk of this Court within that time.

.....

/s/ . . . PHILLIPS
United States Circuit Judge.

U. S. COURT OF APPEALS
FILED
JUNE 21, 1965
EDWARD W. WADSWORTH,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 330

J. C. WADE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 243-244) is reported at 344 F.2d 1016.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1965 (R. 245). A petition for rehearing was denied on June 8, 1965 (R. 246-254). The petition for a writ of certiorari was filed on July 8, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's conviction for mail fraud should be reversed because of improper cross-examination by government counsel.

STATEMENT

Petitioner was found guilty by a jury in the United States District Court for the Middle District of Florida on five counts (1, 6, 8, 11 and 12) charging mail fraud in ordering merchandise for which he did not intend to make payment at various times from June to November 1960 (R. 1-2, 4-6, 7-8, 20). He was sentenced to imprisonment for concurrent terms of five years on each of these counts, the sentences to be subject to modification under 18 U.S.C. 4208(b) and (c) (R. 40-41). On appeal (R. 42-43) the conviction was affirmed (R. 245).

The government's evidence showed that petitioner would order merchandise by postal card in rather small amounts (R. 52-64, 73-74, 78, 83-84, 91, 96-97, 112, 118-119, 123-124, 128, 135). It was stipulated that, in addition to the testimony orally given by the government witnesses, 36 other firms could testify to like transactions (R. 14-16). Petitioner made no payments on the merchandise until after the indictment had been returned in April 1962. Thereafter, he made some payments to the firms named in the indictment, gave promissory notes to some others, and

paid one firm after suit (R. 65, 68-69, 74, 79, 85, 87, 92-93, 97, 113, 116, 120, 124-125, 128, 135).

Petitioner testified that when he ordered the merchandise mentioned in the indictment he did not intend to cheat the sellers (R. 176). He testified that he did not pay bills for the merchandise ordered in 1960 because business was poor in 1960 and 1961 and his charge accounts did not pay him (R. 170-171). After business improved in 1962, he made payments (R. 171). He testified, on cross-examination, he was operating a ladies' apparel store in Bushnell, Florida in 1960 and two other stores as well thereafter (R. 187). When asked if he had money in the bank, he said he didn't know how much; that he usually checked out in payment of bills as fast as money came in (R. 201). He was asked what his income was from the Bushnell shop in 1960 and 1961 and said it was a loss. He gave his receipts as $300 to $400 a month in 1960 and 1961 with a slight increase in 1962 (R. 219). The following then occurred (R. 219-220):

> Q. Mr. Wade, did you fill out an income tax return for yourself or the business that year [1960]?
>
> MR. ROBERTS (petitioner's counsel): Objected to as not being proper cross examination.
>
> THE COURT: Objection overruled.
>
> A. I did not get the question.
>
> Q. Did you file an income tax return for yourself or the business?
>
> A. No, sir.
>
> Q. Did you in 1961?
>
> A. No, sir.

Q. In 1962?

A. No, sir.

Q. You have never been prosecuted for income tax evasion?

A. No, sir.

MR. ROBERTS: I object to that and ask that you admonish the District Attorney on that question.

THE COURT: The objection is sustained and the jury is instructed to disregard that statement.

ARGUMENT

During direct examination petitioner testified to his good faith in making purchases of merchandise and his lack of intent to cheat the sellers. He ascribed his failure to make payments in 1960 and 1961 to poor business conditions and explained the payment after the indictment as resulting from improved business. In these circumstances, questions as to whether petitioner had income during the years in question was directly relevant. It was therefore proper for the government attorney to ask preliminary questions on cross-examination as to whether petitioner had filed income tax returns for 1960, 1961 and 1962. We concede that the additional question whether petitioner had ever been prosecuted for income tax evasion should not have been asked. The court, however, sustained the objection by petitioner's counsel and, in accordance with his request, instructed the jury to disregard that statement. Counsel considered this admonition sufficient and did not view the incident as sufficiently prejudicial to warrant asking for a mis-

trial. It must be presumed that the jury followed the court's instruction to disregard the statement. *Opper* v. *United States*, 348 U.S. 84, 95; *Delli Paoli* v. *United States*, 352 U.S. 232, 242.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

RALPH S. SPRITZER,
Acting Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

AUGUST 1965

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 782462 66

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
NOV 4 1965
JOHN F. DAVIS, CLERK

No. 330

In the Supreme Court of the United States

OCTOBER TERM, 1965

J. C. WADE, PETITIONER

versus

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

ZACH H. DOUGLAS
Suite 104 Law Exchange Building
238 East Forsyth Street
Jacksonville, Florida 32202

Attorney for Petitioner

In the Supreme Court of the United States

OCTOBER TERM, 1965

J. C. WADE, PETITIONER

versus

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner above named respectfully prays that this Court grant rehearing of its order of October 11, 1965, denying his petition for writ of certiorari, and that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Fifth Circuit in the above-entitled case, reported below at 344 F. 2d. 1016, as prayed for in the petition filed

July 8, 1965, and in support of this petition for rehearing represents to the Court as follows:

(1) Since the filing of Petitioner's petition for writ of certiorari, a decision has been handed down by the United States Court of Appeals for the Ninth Circuit that conflicts with the decision of Petitioner's case by the United States Court of Appeals for the Fifth Circuit, 344 F. 2d 1016. In *Bowie v. United States* 345 F. 2d 605 (1965), the Ninth Circuit Court of Appeals held that evidence of distinct offenses of defendant unconnected with that charged in the indictment is not only inadmissible, but so prejudical in nature as to constitute plain and fundamental error. (A copy of the opinion of the Court of Appeals for the Ninth Circuit is appended hereto.)

Petitioner respectfully suggests that the circumstances cited as fundamental error in the *Bowie* case were not so compellingly prejudicial as those in his own trial. In the *Bowie* case, the Court, before the jury, referred to a situation in evidence wherein a conversation had occurred " . . . When the defendant Bowie was under arrest . . .", and was held to have committed plain error by that general reference to the defendant's possible guilt of an unspecified crime; in the case at bar, the prosecutor for the Government did no less than "accuse by interrogation" the Petitioner, J. C. Wade, of an act that 99 of every 100 adult persons in the United States know to be a serious crime: the failure to file income tax returns.

(2) The Petitioner further respectfully contends that the Supreme Court, upon re-examination of those portions of the opinion of the Fifth Circuit Court of Appeals as are addressed to the argument of Petitioner clarified and restated in this Petition for Rehearing, should grant rehearing of Petitioner's cause. *Hickman v. Taylor* 327 U.S. 808, 328 U.S.

876, 329 U.S. 495; *Brinkerhoff-Faris Trust Co. v. Hill,* 280 U.S. 604, 550, 281 U.S. 673.

In affirming Petitioner's cause, the United States Court of Appeals for the Fifth Circuit stated the following ruling as to the questions Petitioner contends the Trial Court so prejudicially allowed the Prosecutor to ask:

> "We agree that they (the questions propounded Petitioner by the prosecutor) were not admissible to show intent, but we think they were proper preliminary questions to a further inquiry, had they been answered in the affirmative, which would have tested the truth of the testimony of the defendant that he had acted in good faith and were admissible as primary evidence." 344 F. 2d 1016, at 1017.

The Petitioner respectfully contends that this ruling is fundamentally antithetical to the right of all defendants to fair trial: that the logical extension of this reasoning would wreak prejudicial embarrassment upon any defendant guilty of a crime entirely extraneous to the crime for which he was on trial: it would require that, to be free from the effects of prejudicial interrogation, a defendant be innocent of all other crimes than that at issue on his trial. In order to function properly, our system of justice must be based on fairness, and not upon inquisitional crusades toward ultimate innocence.

The Petitioner therefore respectfully seeks re-hearing of his petition for writ of Certiorari, so that the Supreme Court may consider whether Petitioner was "tried upon competent evidence, and only for the offense charged." *Boyd v. United States,* 142 S.Ct. 450, 12 S.Ct. 292, 35 L. Ed. 1077.

Wherefore, it is respectfully submitted that this petition for rehearing should be granted.

Respectfully submitted by

ZACH H. DOUGLAS
Suite 104 Law Exchange Building
238 East Forsyth Street
Jacksonville, Florida 32202

Attorney for Petitioner

Please note extract from a recent case following this petition. I did not have time to better arrange.

Respectfully,

Wardell BOWIE, Appellant,
v.
UNITED STATES of America,
Appellee.
No. 19271.

United States Court of Appeals
Ninth Circuit.

May 12, 1965.

Defendant was convicted of certain narcotic offenses. The United States District Court for the Southern District of

California, Central Division, William D. Murray, J., entered judgment, and the defendant appealed. The Court of Appeals, Jertberg, Circuit Judge, held that where narcotics agent testified that defendant had made statement to agent concerning a different narcotics offense, and District Court during government's closing argument to jury struck agent's testimony and instructed jury to disregard testimony because statement was made while defendant was "under arrest," an alleged fact of which jury had not previously been informed, but District Court did not instruct jury to disregard reference to arrest, there was plain error, which would be noticed by Court of Appeals, though defendant had not moved for mistrial, and judgment of conviction would be reversed.

Reversed and remanded for new trial.

See also 9 Cir., 318 F.2d 693.

1. Criminal Law 656(3), 1044

Where narcotics agent testified that defendant had made statement concerning a different narcotics offense, and federal District Court struck testimony and instructed jury to disregard testimony because statement was made while defendant was "under arrest," an alleged fact of which jury had not previously been informed, but did not instruct jury to disregard reference to arrest, there was plain error, which would be noticed by Court of Appeals, though defendant had not moved for mistrial, and judgment of conviction would be reversed. Narcotic Drugs Import and Export Act, § 2(c, f), 21 U.S.C.A. § 174; Fed.Rules Crim.Proc. rule 52, 18 U.S.C.A.

2. Criminal Law 369(1)

Subject to well-defined exceptions, when defendant is on trial for specific offense, evidence of distinct offense unconnected with that charged in indictment is not admissible.

CERTIFICATE OF COUNSEL

I HEREBY CERTIFY that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

ZACH H. DOUGLAS
Attorney for Petitioner.

CERTIFICATE OF SERVICE

, I do certify that three copies of the foregoing Petition for Rehearing have been furnished, by mail, to Hon. Thurgood Marshall, Solicitor General, Dept. of Justice Building, Washington 25, D.C. this 3rd day of November, 1965.

ZACH H. DOUGLAS
Attorney for Petitioner